

**IN THE UNITED STATE DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

ANGEL RODRIGUEZ,

Plaintiff,

NO. 2:11-cv-00590-RSM

v.

PORTFOLIO RECOVERY
ASSOCIATES, LLC,

PLAINTIFF'S REPLY IN SUPPORT OF
MOTION TO DISMISS DEFENDANT'S
COUNTERCLAIM

Defendant.

NOW COMES Plaintiff, ANGEL RODRIGUEZ ("Plaintiff"), by and through his attorneys, KROHN & MOSS, LTD., hereby files his reply brief in support of his motion to dismiss the counterclaim filed by Defendant, PORTFOLIO RECOVERY ASSOCIATES, LLC ("Defendant").

In support thereof, Plaintiff states as follows:

I. INTRODUCTION

Plaintiff's Verified Complaint alleges Defendant violated the Fair Debt Collection Practices Act, 15 U.S.C. 1692 *et seq.* ("FDCPA") in it continued calls to him regarding a debt owed by another individual. (DE 1). On August 18, 2011, Plaintiff filed his Motion to Dismiss Defendant's Counterclaim ("Motion"). (DE 11). Plaintiff filed his Motion pursuant to Fed. R. Civ. P. 12(b)(6). (DE 11). Defendant filed an Amended Answer, Affirmative Defenses, and Counterclaim on September 2, 2011. (DE 13). As noted *infra*, Defendant's amended claim is nearly identical to its original, filed on August 5, 2011. (DE 9, 13). On September 12, 2011, Defendant filed its Opposition to Plaintiff's Motion ("Opposition"). (DE 14). In its unsuccessful attempt to oppose Plaintiff's Motion, Defendant erroneously argues the following: (1) it alleged sufficient facts to prove its Counterclaim; (2) its Counterclaim pursuant to 15 U.S.C. 1692k(a)(3) is proper; and (3)

1 Defendant's admission to possibly calling Plaintiff on a debt that was not his does not help defeat
 2 Defendant's Counterclaim. (DE 12). In addition to the arguments presented in Plaintiff's Motion,
 3 the arguments presented herein also demonstrate that Defendant's Counterclaim should be
 4 dismissed.

5 Defendant's original Counterclaim states in full: "25. PRA is entitled to recover its attorney's
 6 fees and costs under 15 U.S.C. §1692k(a)(3), as plaintiff has brought this action in bad faith and for
 7 the purpose of harassment." (DE 9, ¶ 25). After Plaintiff's Motion and *without leave of Court*,
 8 Defendant filed and Amended Answer, Affirmative Defenses, and Counterclaim, where Defendant
 9 added only one additional paragraph to its Counterclaim, and revised the remaining paragraph; every
 10 other aspect of Defendant's responsive pleading remained identical. Specifically, Defendant's
 11 Counterclaim now states:
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- 13
- 14 25. PRA realleges and incorporates by reference paragraphs 1 through 24 above.
 - 15 26. Based on the conduct described in paragraph 19 and the other
 - 16 facts set forth above, plaintiff has brought this action in bad
 - 17 faith and for the purpose of harassment. Accordingly, PRA is
 - 18 entitled to recover its fees and costs under 15 U.S.C.
 - 19 §1692k(a)(3).

20 (DE 13, ¶¶ 25-26). Paragraph 19, referenced in its Counterclaim, states: "19. To the extent he had
 21 any telephone conversation with PRA, plaintiff was disingenuous about his true identify, used two
 22 different names, and obstructed PRA's good faith attempts to conduct its business in compliance
 23 with the law. Accordingly, plaintiff's claims should be barred by his own conduct and/or by the
 24 doctrine of unclean hands." (DE 13, ¶ 19). Indeed Defendant's "amended" Counterclaim remains
 25 substantively identical to its original Counterclaim. Accordingly, and in the interest of judicial
 26 economy, Plaintiff submits this reply in support of his motion, as opposed to refilling his motion
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1 which will contain the identical argument.

2 **II. DEFENDANT’S AMENDED ANSWER, AFFIRMATIVE DEFENSES AND**
 3 **COUNTERCLAIM WAS FILED WITHOUT LEAVE AND SHOULD BE DISMISSED**

4 Pursuant to the Federal Rules of Civil Procedure, “[a] party may amend its pleading once as a
 5 matter of course within 21 days after serving it.” Fed. R. Civ. P. 15(a)(1)(A). If not within 21 days,
 6 a party must either seek a stipulation from its adversary, or leave of court. Fed. R. Civ. P. 15(a)(2).
 7 Defendant filed its Answer, Affirmative Defenses, and Counterclaim on August 5, 2011. (DE 9).
 8 Thus, in order to file an amended responses pleading without a stipulation or leave of Court,
 9 Defendant was required to file by August 26, 2011. *See* Fed. R. Civ. P. 15(a)(1)(A). Defendant
 10 failed to obtain a stipulation from Plaintiff and failed to seek leave of Court. However, Defendant
 11 failed to file its amended pleading until September 2, 2011, one full week beyond the statutory
 12 window. (DE 13). Accordingly, Defendant’s amended pleading should be dismissed.

13 **III. DEFENDANT’S RELIANCE ON *HYLKEMA* AND *DEXTER* IS MISPLACED**

14 Plaintiff asserts that Defendant’s claim for fees pursuant to 1692k(a)(3) is not a proper cause
 15 of action that can be brought as a counterclaim, as the Defendant erroneously has done. Plaintiff
 16 cites case law from across the country whereby the court have held that a counterclaim is not the
 17 proper chanel to see redress under 1692k(a)(3). *See Kropf v. TCA, Inc.*, 2010 WL 4722282 at *1, ---
 18 F.Supp.2d. --- (E.D. Mich. Nov. 22, 2010) (“the Fair Debt Collection Practices Act **does not create**
 19 ***an independent cause of action for attorney’s fees.***”); *Perry v. Stewart Title Co.*, 756 F. 2d 1197,
 20 1211 (5th Cir. 1985) (“[t]o recover attorney's fees under the FDCPA, the **prevailing** defendant must
 21 show affirmatively that the plaintiff brought the FDCPA claim in bad faith and for the purpose of
 22 harassment.”); *Hardin v. Folger*, 704 F.Supp. 355, 356-57 (W.D.N.Y.1988) (dismissing the
 23 counterclaim because section 1692k(a)(3) “provides relief, **but not a claim**, to defendants”);

1 *Chlanda v. Wymard*, 1994 WL 583124 at *1 (S.D. Ohio Aug. 16, 1994) (finding that the defendant's
 2 counterclaim for bad faith and harassment “*fails to state a claim upon which relief can be*
 3 *granted*”); *Crow v. Wolpoff & Abramson*, 2007 WL 1247393 at *5 (D. Minn. Apr. 19, 2007)
 4 (denying Defendant’s request to treat the affirmative defense of bad faith as a counterclaim, and
 5 holding that 15 U.S.C. § 1692k(a)(3) creates a claim *after a finding that Plaintiff’s case was*
 6 *brought in bad faith, which can only take place when the primary dispute is resolved*); *Kirscher v.*
 7 *Messerli & Kramer, P.A.*, 2006 WL 145162 at *7 (D. Minn. Jan. 18, 2006) (*dismissing the*
 9 *defendant’s counterclaim* but permitting it to request attorney’s fees *by a separate motion filed at*
 10 *a later stage in the proceedings*); *Young v. Reuben*, 2005 WL 1484671 at *1-2 (S.D. Ind. June 21,
 11 2005) (same).

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 13 On the other hand, Defendant erroneously relies on only two cases to support its position that
 14 its Counterclaim is valid; *Hylkema v. Palisades Collection, LLC*, 2008 U.S. Dist. LEXIS 21241
 15 (W.D. Wash 2008), and *Dexter v. Tran*, 2009 U.S. Dist. LEXIS 118994 (E.D. Wash 2009). Further,
 16 Defendant’s reliance on *Hylkema* and *Dexter* is fatally flawed.

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 18 Defendant seems to miss the substance of the ruling in *Hylkema*. Specifically, the *Hylkema*
 19 court was presented with a second motion to dismiss the collector’s counterclaim for bad faith.
 20 *Hylkema v. Palisades Collection, LLC*, 2008 U.S. Dist. LEXIS 21241 at*1 (W.D. Wash 2008). Prior
 21 to *Hylkema*’s motion, the court granted the collector leave to cure deficiencies in its pleading. *Id.*
 22 *Hylkema*’s motion to dismiss alleged that the collector failed to cure its deficiencies, and failed to
 23 timely file and amended answer, affirmative defenses and counterclaim. *Id.* at *1-2. The *Hylkema*
 24 court denied *Hylkema*’s second motion to dismiss on the grounds that the collector did cure its
 25 defects and that *Hylkema* suffered any prejudice by the collector’s late filing. *Id.* at *2. Defendant
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1 fails to provide language that a counterclaim pursuant to 1692k(a)(3) is proper.

2 Likewise, Defendant is equally wrong in its analysis of *Dexter*. Defendant purports that the
3 *Dexter* court considered the substantive merits of the collectors counterclaim, and procedurally
4 found that a counterclaim pursuant to 1692k(a)(3) was proper. However, just language does not
5 exist. Before the *Dexter* court was the collector's cross-motion for summary judgment. *Dexter v.*
6 *Tran*, 2009 U.S. Dist. LEXIS 118994 at *1 (E.D. Wash 2009). In its holding, the *Dexter* court
7 stated:
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9 The Court does not find that the above-captioned action was brought
10 in bad faith or for the purpose of harassment. Moreover, the Court
11 does not find that the Defendants are entitled to recover their
12 attorneys fees and costs by virtue of the parties' Reaffirmation
13 Agreement. Plaintiff brought this action under the Fair Debt
Collection Practice Act, and did not allege breach of the reaffirmation
agreement.

14 *Id.* at *2. Despite Defendant's position, nowhere in *Dexter* does the court find a proper counterclaim
15 pursuant to 1692k(a)(3), and Defendant fails to show otherwise. Furthermore, the aforementioned
16 ruling in *Dexter* was decided on summary judgment. Thus, it logically flows, and is consistent with
17 Plaintiff's case law cited *supra*, that any claim for bad faith pursuant to 1692k(a)(3), is to be decided
18 after decision on the merits of a plaintiff's claim.
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20 **IV. DEFENDANT'S AMENDED COMPLAINT AND COUNTERCLAIM** 21 **CONTINUOUSLY FAILS TO ALLEGE FACTS TO SUPPORT A SHOWING OF** 22 **BAD FAITH**

23 Without conceding that Defendant's Counterclaim for fees pursuant to 1692k(a)(3) is proper,
24 *see infra*, Defendant still fails to allege any *facts* that Plaintiff filed his Complaint in bad faith.
25 Defendant's only "facts" alleged by Defendant are its admissions / denials to Plaintiff's allegations
26 and affirmative defenses. (DE 13). Again, Defendant offers nothing but self-serving statements in
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1 hopes that there is bad faith. A party's allegations must be pled in a manner that establishes a
 2 plausibility of entitlement to relief as opposed to a mere possibility. *Bell Atl. Corp. v. Twombly*, 127
 3 S. Ct. 1955 (U.S. 2007). Further, while legal conclusions can provide a framework of a complaint
 4 (or counterclaim), they must be supported by factual allegations. *Ashcroft v. Iqbal*, 129 S. Ct. 1937,
 5 1949-50 (2009). Defendant provides no specific facts of any bad faith by Plaintiff and accordingly,
 6 its counterclaim must be dismissed.

8 **V. DEFENDANT ESSENTIALLY CONCEDES PLAINTIFF FILED A VALID FDCPA CLAIM**

10 It is puzzling how Defendant can contend that Plaintiff brought her lawsuit in bad faith,
 11 while simultaneously conceding that it placed calls to Plaintiff attempting to reach another
 12 individual. The purpose of the FDCPA is to eliminate abusive debt collection practices by debt
 13 collectors and to promote consistent State action to protect consumers against debt collection abuses.
 14 See 15 U.S.C. 1692(e). Even "technical violations" are valid and actionable causes of action under
 15 the FDCPA. See *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, et al.*, 130 S. Ct. 1605
 16 (2010).

18 Plaintiff has alleged that Defendant called his telephone looking for Tracy, and that on at
 19 least 10 separate occasions, informed Defendant that Tracy could not be reached at his number. (DE
 20 1, ¶¶ 10-11). Plaintiff further alleged that Defendant continued to call him despite the
 21 aforementioned. (DE 1, ¶ 12). Defendant admits to calling Plaintiffs number seeking a debt for
 22 Tracy. (DE 11, 13). Under section 1692d(5) of the FDCPA, which Plaintiff alleges in his
 23 Complaint, a collector may not cause a "telephone to ring or engage *any person* in telephone
 24 conversation repeatedly or continuously with intent to annoy, abuse, or harass *any person* at the
 25 called number." 15 U.S.C. 1692d(5). Such a claim, even if he recipient is not the debtor, is valid
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1 under the FDPCA, and therefore, cannot be in bad faith. *See Meadows v. Franklin Collection*
2 *Service*, No. 10-13474, 2011 WL 479997 at *3 (11th Cir. Feb. 11, 2011).

3 **VI. CONCLUSION**

4 Defendant fails to provide any competent evidence to support its conclusory argument that it
5 is somehow entitled to assert its Counterclaim pursuant to 15 U.S.C. 1692k(a)(3). Without
6 providing any competent evidence to oppose Plaintiff's Motion, Defendant further concedes
7 Plaintiff's viable FDCPA claim. Wherefore, this Honorable Court should grant Plaintiff's Motion to
8 Dismiss Defendant's Bad Faith Counterclaim.
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10 WHEREFORE, Plaintiff respectfully requests that this Honorable Court, Defendant's
11 Counterclaim, submitted in connection with Defendant's Answer to Plaintiff's Verified Complaint,
12 be dismissed.
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1 RESPECTFULLY SUBMITTED,

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3 DATED: September 16, 2011

KROHN & MOSS, LTD.

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5 By: /s/ Sharon Cousineau

Sharon Cousineau (Local Counsel)

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16 **CERTIFICATE OF SERVICE**

17
18 I hereby certify that on September 16, 2011, I electronically filed the foregoing with the
19 Clerk of Court using the CM/ECF system which will send notification to the following:

20 Robert E. Sabido rsabido@cvk-law.com

21 By: /s/ Sharon Cousineau

22 Sharon Cousineau